

For Beginners: A Basic Introduction to the Organizational Guidelines



- ***Betsy Ervin, Deputy Chief U.S. Probation Officer, Western District of North Carolina***
- ***Kathleen Cooper Grilli, General Counsel-USSC***
- ***John Steer, Of Counsel, Law Offices of Mark Allenbaugh Former Vice Chair, USSC***

Initial Development of the FSGO

- Authorization: The **Sentencing Reform Act of 1984**
 - Principal purposes to reduce sentencing disparity, prevent crime
 - US Sentencing Commission to develop sentencing guidelines for individuals and organizations
- Initial 1991 FSGO pioneered concept of punishment mitigation for organizations w/ effective compliance program and for cooperation

Subsequent FSGO Amendments

2004 Updating and Strengthening Amendments

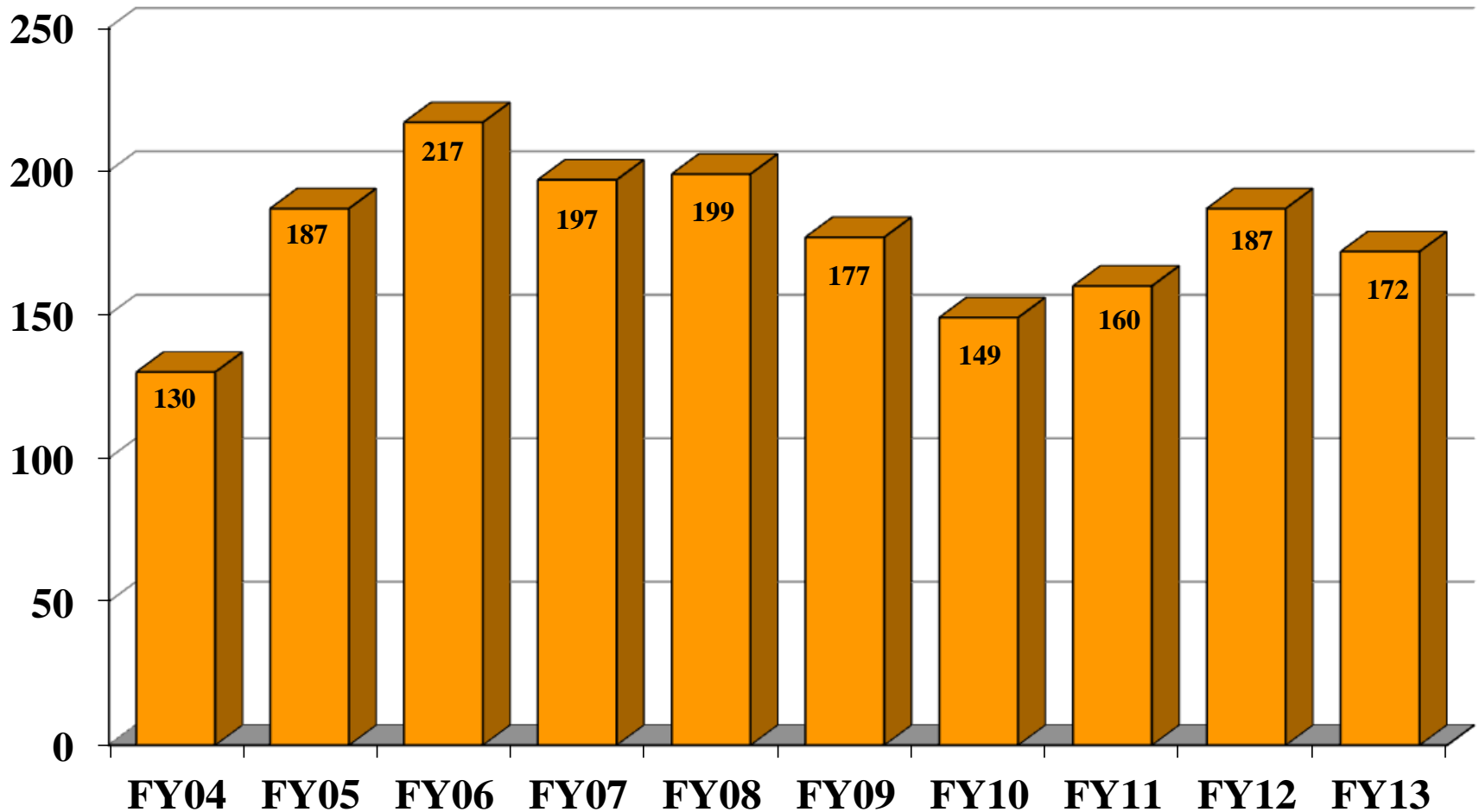
- Created more visible, stand alone **Guideline, Section 8B2.1**, describing more detailed elements of an Effective Compliance and Ethics Program.
- Expressly joined Ethics and Compliance functions, emphasizing importance of Organizational Culture.
- Emphasized importance of Risk Assessments.
- Established express Governing Authority Responsibilities.
- Strengthened all program elements.

Subsequent FSGO Amendments

2010 Amendments

- Clarified expected responsive and remedial actions when violations occur:
 1. Restitution, remediation
 2. Voluntary disclosure
 3. Compliance program review, possible outside expertise
- Emphasized importance of CCO Direct Reporting , Independence
 1. Direct reporting to governing authority re: criminal conduct occurrences and at least yearly re: compliance program operation
 2. Policy expressed in context of judging program as effective even if high level person involved in wrongdoing.
- Fact of Whistleblower Report does not render program per se ineffective.

Number of Organizational Cases Fiscal Years 2004-2013



SOURCE: United States Sentencing Commission, 2004-2013 *Sourcebooks of Federal Sentencing Statistics*.

Overview of Chapter 8

- **Chapter 8 reflects general principles –**
 - **Organizations should remedy harm caused by offense (§§8B1.1 - 8B1.4)**
 - **Organizations with criminal purpose should be divested (§8C1.1)**
 - **“Carrot and Stick Approach” - Fine ranges determined by seriousness of offense and culpability (§§ 8C2.1 - 8C2.10)**
 - **Probation to implement sanctions and reduce recidivism (§§ 8D1.1 – 8D1.4)**

Part A – General Application Principles

- Apply to felony and Class A misdemeanors (§8A1.1)
- Apply Chapter 8 in order (§8A1.2)
 - Part B - Restitution
 - Part C – Fines
 - Part D – Probation
 - Part E – Special Assessments, Forfeitures and Costs

Part B, Subpart 1

Remedying Harm

- Restitution (§8B1.1)
- Remedial Orders (§8B1.2)
- Community Service (§8B1.3)
- Order of Notice to Victims (§8B1.4)

Restitution - §8B1.1

- Requires identifiable victim
- If so, court shall either
 - Enter restitution order if authorized by specified statutes or
 - Impose term of probation or supervised release with condition requiring restitution if offense meets criteria for restitution order in § 3663(a)(1)
- Restitution paid before fine

Remedial Order - §8B1.2

- Imposed as a condition of probation.
- Remedy harm caused by offense and eliminate or reduce risk that the instant offense will cause future harm.
- Examples include a product recall for a food and drug violation or a cleanup order for an environmental violation.

Community Service - §8B1.3

- Ordered as a condition of probation.
- Must be reasonably designed to repair harm caused by the offense.
- Must be preventive or corrective action directly related to the offense and serving one of the purposes of sentencing.

Order of Notice to Victims - §8B1.4

- Apply §5F1.4.
- Court may order defendant to pay cost of giving notice to victims.
- Cost may be set off against fine imposed if imposition of both sanction is excessive.

Criminal Purpose Organizations - §8C1.1

- If court determines that organization operated primarily

- For a criminal purpose or
- By criminal means

then set fine in an amount sufficient to divest organization of all net assets.

- Net assets means all assets remaining after payment of all legitimate claims by known innocent bona fide creditors.

Applicability of Fine Guidelines - §8C2.1

- Apply §§8C2.2 through 8C2.9 to each count for which offense level is determined under either
 - Listed Chapter Two Guidelines or
 - RICO violations, attempts, solicitations, or conspiracies, aiding and abetting, accessory after the fact, and misprision of felony if offense level for underlying offense is determined under one of the listed Chapter Two Guidelines.

continued

Types of Chapter Two Offenses Covered by Guidelines Fine Provisions

- Fraud (§2B1.1)
- Insider Trading (§2B1.4)
- Trespass (§2B2.3)
- Commercial Bribery (§2B4.1)
- Criminal Infringement of Copyright or Trademark (§2B5.3)
- Offenses involving altering or removing motor vehicle identification numbers (§2B6.1)
- Certain offenses involving public officials (§§2C1.1, 2C1.2, 2C1.6)
- Offenses involving drug paraphernalia and drug regulatory offenses (§§2D1.7, 2D3.1, 2D3.2)

continued

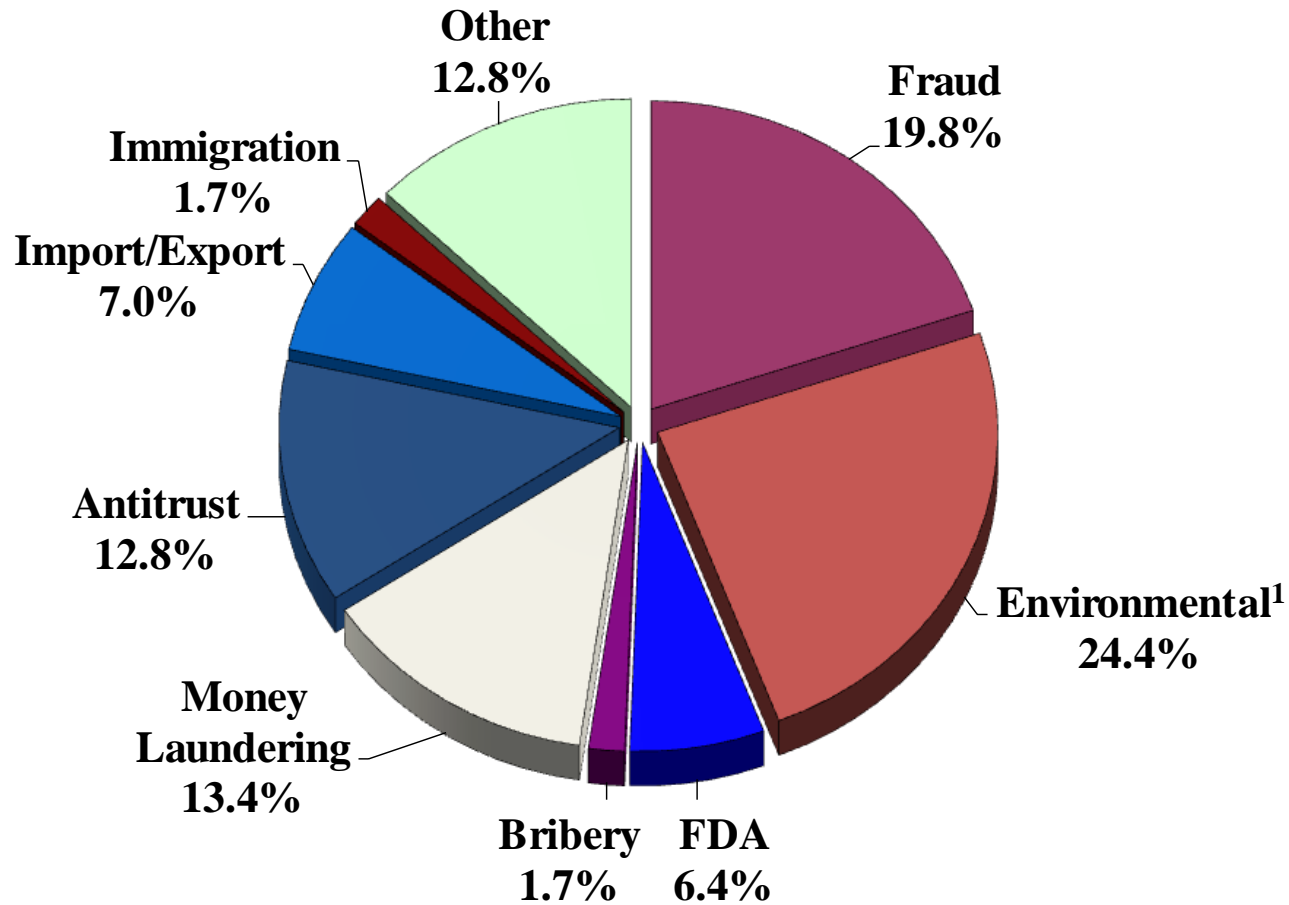
Types of Chapter Two Offenses Covered by Guidelines Fine Provisions

- Certain offenses involving criminal enterprises or racketeering (§§2E3.1, 2E4.1, 2E5.1, 2E5.3)
- Obscenity offenses (§2G3.1)
- Certain offenses involving explosive materials or firearms (§§2K1.1, 2K2.1)
- Smuggling, Transporting or Harboring an Unlawful Alien (§2L1.1)
- Odometer Laws and Regulations (§2N3.1)
- Antitrust (§2R1.1)
- Money laundering and structuring offenses (§§2S1.1, 2S1.3)
- Certain tax offenses (§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.8, 2T1.9, 2T2.1, 2T2.2, 2T3.1)

Types of Chapter Two Offenses Not Covered by Guidelines Fine Provisions

- Environmental
- Food, Drugs, Agricultural and Consumer Products
- Civil/Individual Rights
- Administration of Justice (*e.g.*, contempt, obstruction of justice, and perjury)
- National Defense

Primary Offenses of Organizational Cases Fiscal Year 2013



¹The Environmental category includes the following offense types: Environmental-Water Pollution, Environmental-Air Pollution, Environmental-Hazardous/Toxic Pollutants, and Environmental-Wildlife.

Preliminary Determination of Inability to Pay Fine - §8C2.2

No need to make guideline fine
determination in case where either

- Organization cannot and is not likely to become able to pay restitution required under §8B1.1 or
- Organization cannot and is not likely to become able to pay minimum guideline fine.

Offense Level - §8C2.3

For counts covered by §8C2.1

- Use applicable Chapter Two guideline determine offense level (BOL and all applicable SOC's).
- If there is more than one count, apply Chapter Three, Part D to determine combined offense level.
- Do not apply any other parts of Chapter Three (e.g., acceptance of responsibility or obstruction of justice).

Base Fine = §8C2.4

Apply the greater of

- Amount from Offense Level Fine Table
- Pecuniary gain to organization, or
- Pecuniary loss from offense intentionally, knowingly, or recklessly caused by organization

Unless

- Chapter Two guideline includes special instruction for organizational fines or
- Calculation of pecuniary gain or loss would unduly complicate or prolong sentencing process

Measuring Culpability

Base Fine (§8C2.4) x Multipliers (§8C2.6) = Fine Range (§8C2.7)

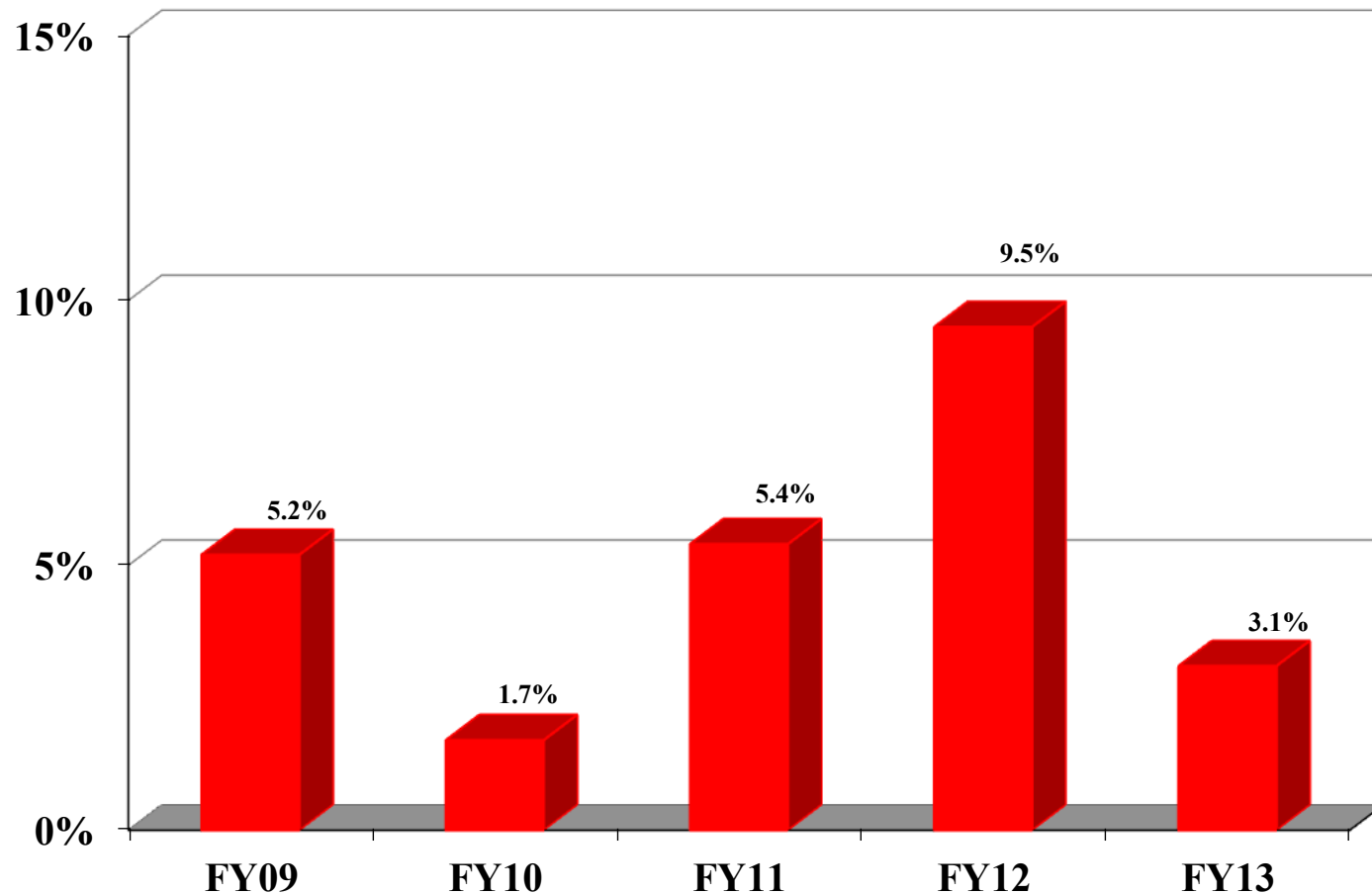
Six Factors to calculate “culpability score”:

- ↑ Tolerance of criminal activity**
- ↑ Prior history**
- ↑ Violation of order**
- ↑ Obstruction of justice**
- ↓ Effective compliance and ethics program**
- ↓ Self-reporting, cooperation, acceptance of responsibility**

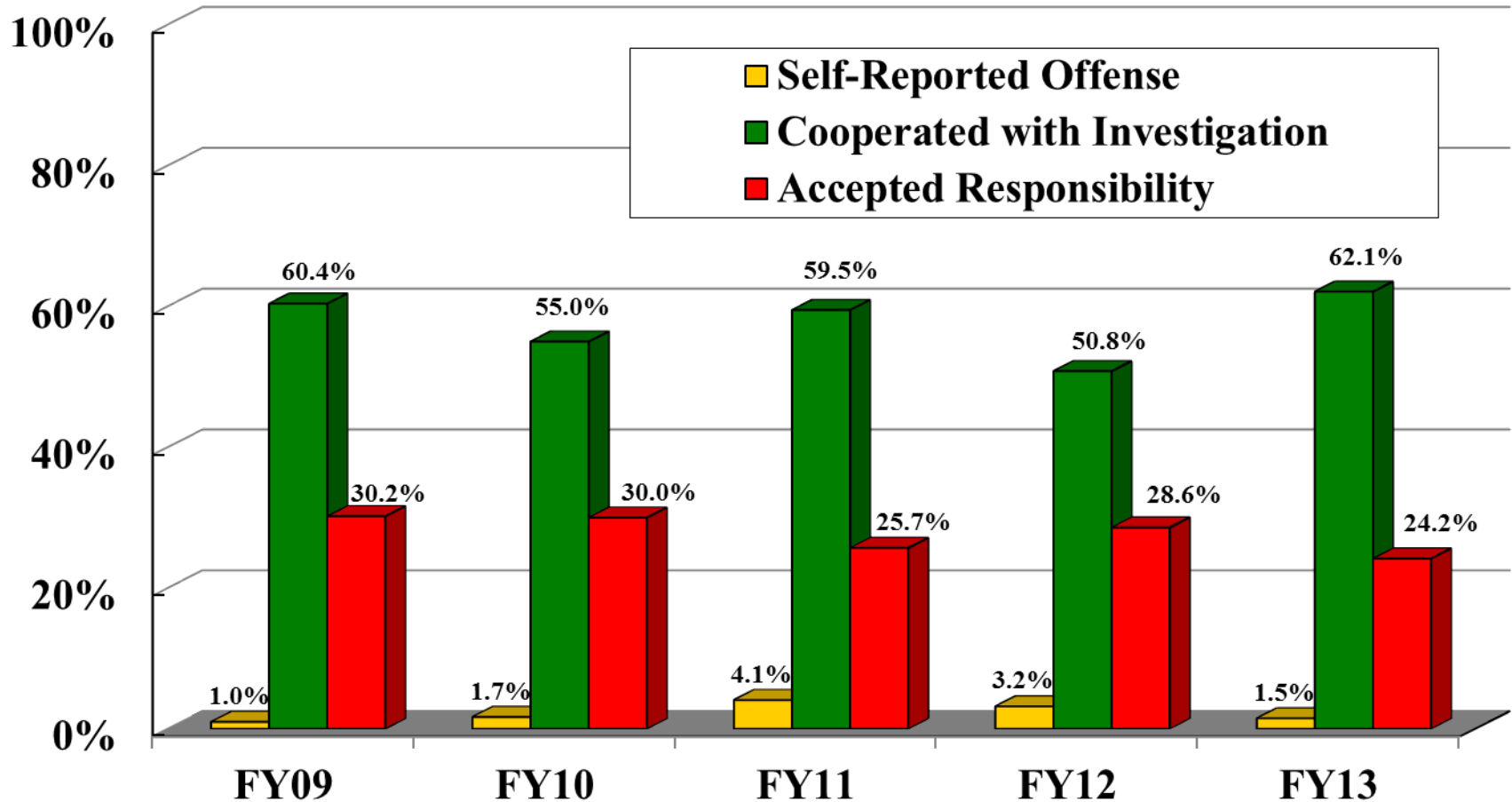
Determining Culpability Score - §8C2.5

BASE OFFENSE LEVEL	5 POINTS
Involvement in or Tolerance of Criminal Activity	+5/ +4 /+3/+2/ +1
Prior History	+2 or +1
Violation of an Order	+2 or +1
Obstruction of Justice	+3
Effective Program to Prevent and Detect Violations of Law	-3
Self-Reporting, Cooperation <u>and</u> Acceptance of Responsibility	-5 / -2 /-1

Percentage of Organizations Sentenced that Obstructed Justice (§ 8C2.5(e)) Fiscal Years 2009-2013



Percentage of Organizational Cases Receiving Reduction in Culpability Score Under § 8C2.5(g) Fiscal Years 2009-2013



SOURCE: United States Sentencing Commission, 2009-2013 Sourcebooks of Federal Sentencing Statistics.

Effective Compliance Programs - §8B2.1(a)

AN EFFECTIVE COMPLIANCE PROGRAM MUST:

1. Exercise due diligence in fulfilling the seven minimum requirements at §8B2.1(b)(2) (*see next slide*).
2. Promote ethical conduct and organizational culture that encourages a commitment to compliance with the law.

Seven Minimum Requirements -

§8B2.1(b)(2)

1. Standards and procedures to **prevent** and **detect** criminal conduct.
2. **Board** must be knowledgeable about and oversee program; top **management** must ensure effectiveness of program; specific individual(s) within high-level personnel must have responsibility.

continued...

Seven Minimum Requirements - §8B2.1(b)(2)

3. Reasonable efforts not to include within substantial authority personnel individuals whom organization knew or should have known have engaged in illegal activities or conduct inconsistent with effective program.
4. Communicate standards and procedures by **training** directors, employees and, as appropriate, agents, and by other means.

continued...

Seven Minimum Requirements --

§8B2.1(b)(2)

5. Monitor and audit to **detect** criminal conduct; **evaluate** program periodically; have and publicize a system for **reporting** suspected violations and seeking guidance.
6. Promote and consistently **enforce** through appropriate incentives to perform in accordance with the program and appropriate discipline.
7. **After criminal conduct is detected**, take reasonable steps to **respond** appropriately and **prevent** further similar criminal conduct, including necessary modifications to program.

Determining the Fine within the Fine Range

- §8C2.8

Factors to consider (§8C2.8(a)):

- The purposes of sentencing under §3553(a);
- Role in the offense;
- Collateral consequence of conviction;
- Nonpecuniary loss caused or threatened;
- Involvement of vulnerable victim;
- Prior criminal record of high level personnel;
- Prior civil or criminal misconduct not counted in culpability score;
- Culpability score higher than 10 or lower than 0;
- Partial but incomplete satisfaction of conditions of culpability score factors;
- Any factor in § 3572(a) ;
- Failure to have effective compliance and ethics program.

Court may weigh importance of these factors and others (§8C2.8(b)).

Other Guideline Provisions relating to Calculation of Fine

Disgorgement - §8C2.9

- Add to fine any gain that has not or will not be paid as restitution or for other remedial measures.

Calculation of Fine for Other Counts - §8C2.10

- Determine fine for counts not covered under §8C2.1 by applying provisions of §§ 3553 and 3572.

Implementing the Sentence of A Fine

Imposing a Fine - §8C3.1

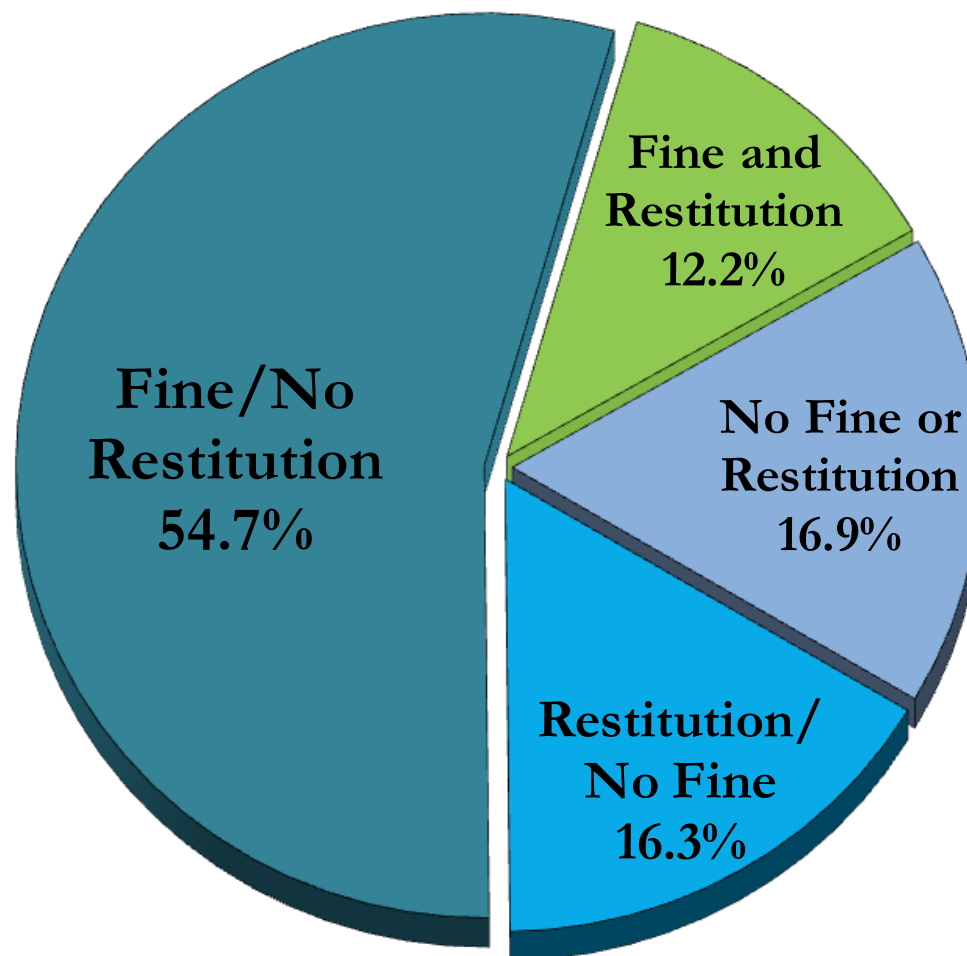
- Use guideline fine range as determined under §§8C1.1 and 8C1.9, or §8C1.10 unless
- Guideline minimum fine exceeds statutory maximum fine, in which case statutory maximum fine becomes guideline fine, or
- Guideline maximum fine is lower than statutory minimum fine, in which case statutory minimum fine becomes guideline fine.

Payment of the Fine - §8C3.2

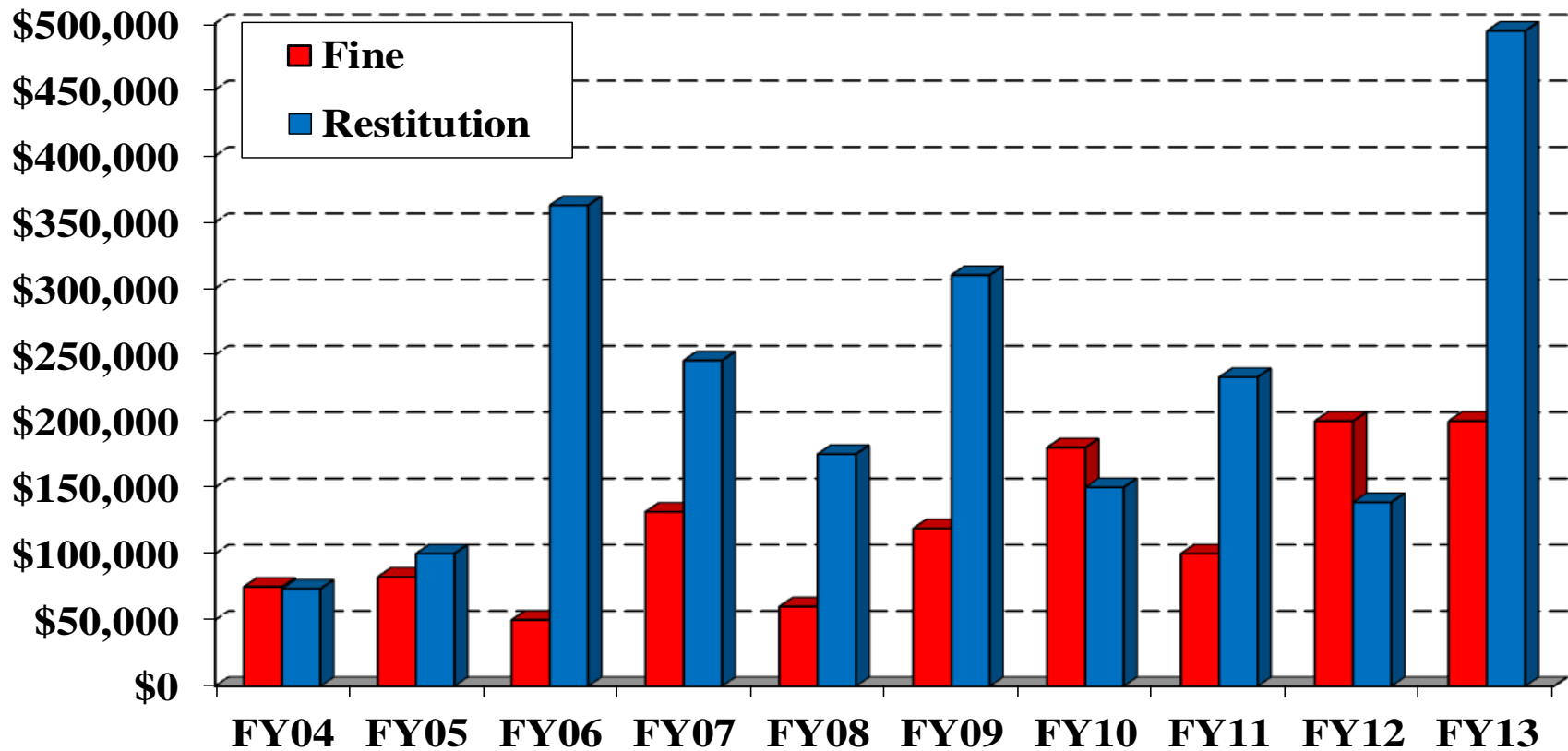
- Immediate for organizations operating as criminal purpose or by criminal means.
- Otherwise, immediate unless organization is financially unable to make or payment would pose undue burden on organization, then payment at earliest possible date, either by date certain or installment schedule.

continued

Types of Monetary Sentences Fiscal Year 2013



Median Fine and Restitution for Organizations Fiscal Years 2004-2013¹



¹FY04 data consists of only pre-*Blakely* data from October 1, 2003 through June 24, 2004. FY05 data consists of only post-*Booker* data from January 12, 2005 through September 30, 2005.

Implementing the Sentence of A Fine

Reduction of Fine Based on Inability to Pay - §8C3.3

- If fine would impair ability to make restitution or
- If organization unable and unlikely to become able to pay fine.

Fines Paid by Owners of Closely Held Organizations - §8C3.4

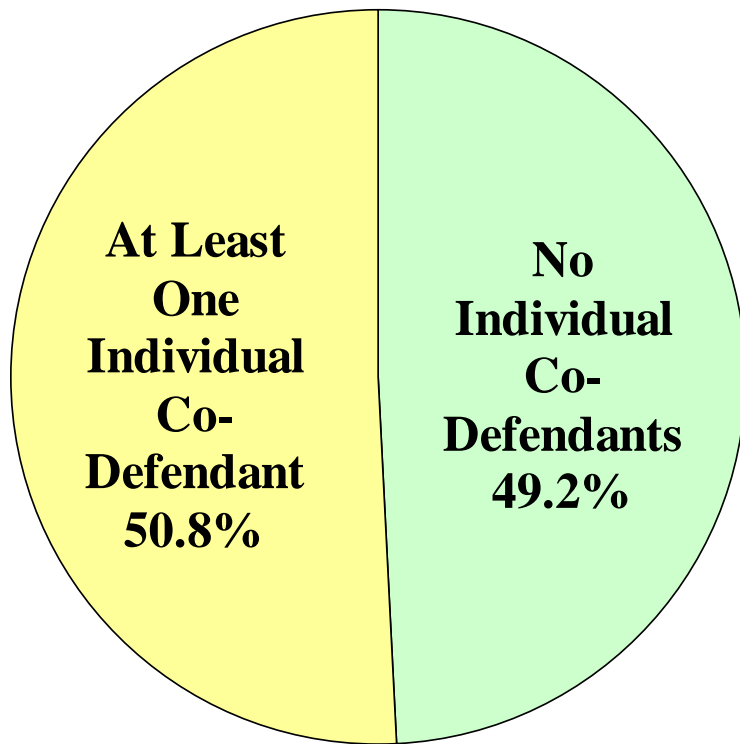
- Organization's fine may be offset by owners' fines for same offense conduct.

Top Ten Organizational Fines and Restitution Orders by Offense Type (Millions of Dollars) Fiscal Year 2013

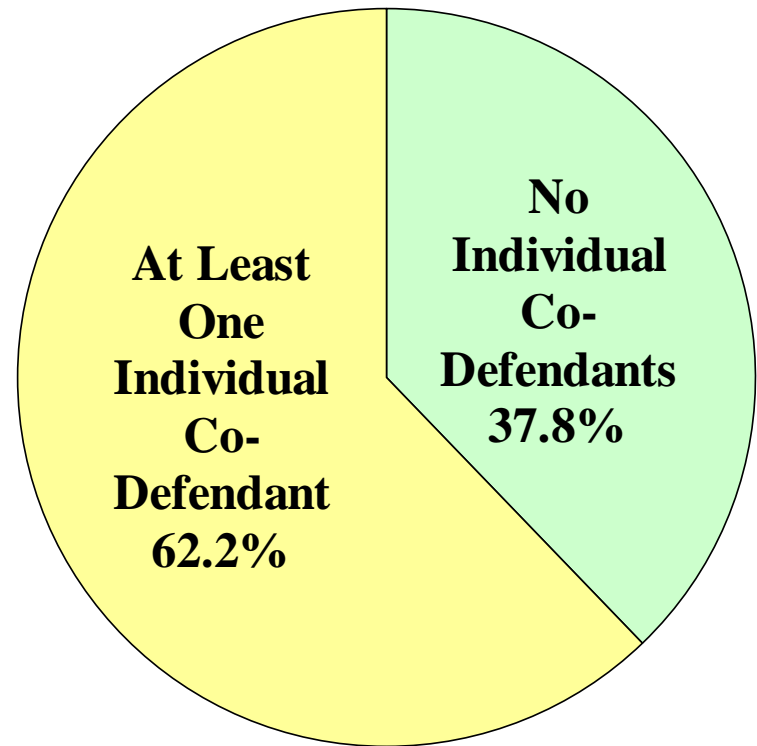
Fines		Restitution	
Environmental	\$1,256.0	Fraud	\$57.4
Food & Drug	\$ 500.0	Tax	\$20.0
Food & Drug	\$ 136.0	Fraud	\$15.9
Environmental	\$ 100.0	Fraud	\$11.5
Fraud	\$ 100.0	Money Laundering	\$ 9.5
Environmental	\$ 40.0	Money Laundering	\$ 9.5
Environmental	\$ 40.0	Money Laundering	\$ 3.7
Tax	\$ 22.1	Fraud	\$ 3.5
Antitrust	\$ 21.1	Fraud	\$ 3.4
Antitrust	\$ 19.0	Fraud	\$ 2.7

Relationship of Individual Offender To Organizational Cases Fiscal Years 2012-2013

FY12



FY13



Imposition of Probation - §8D1.1

Court shall order probation

- If necessary to secure any remediation required by court (restitution, remedial order, community service);
- If payment of monetary penalty is required, which is not paid in full at sentencing;
- If organization has 50 or more employees, is required to have E&C program, and does not;
- If within five years, organization engaged in similar criminal misconduct and instant offense occurred after adjudication;
- If high level personnel involved in offense engaged in similar criminal misconduct within five years of instant offense and instant offense occurred after adjudication;
- To ensure changes made within organization to reduce likelihood of future criminal conduct;
- If sentence does not include fine; or
- If necessary to accomplish one or more of the purposes of sentencing.

Term of Probation - §8D1.2

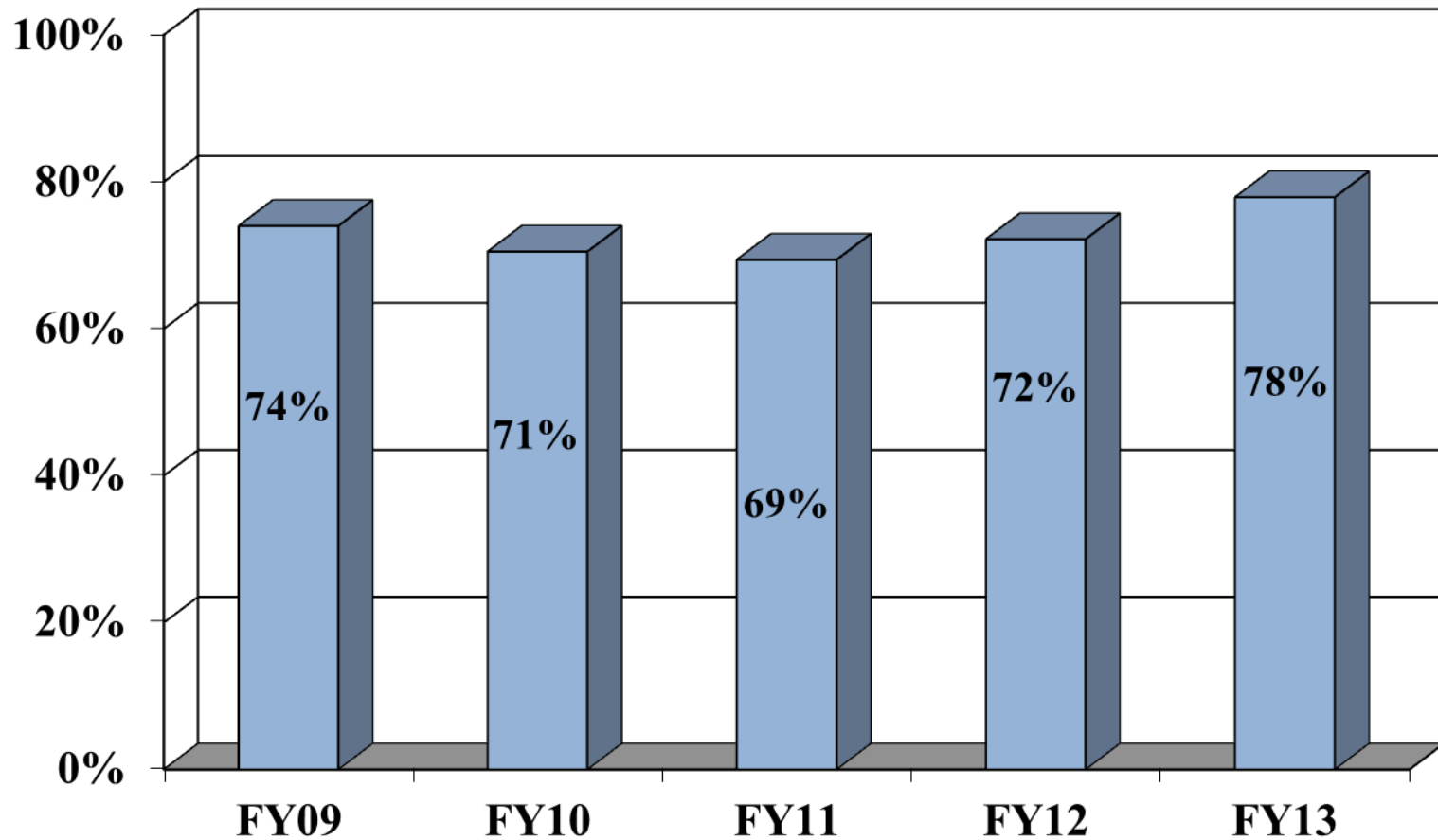
For Felony Offenses

One – Five years

For Class A misdemeanors

No more than five years

Percentage of Organizational Cases Receiving Probation Fiscal Years 2009-2013



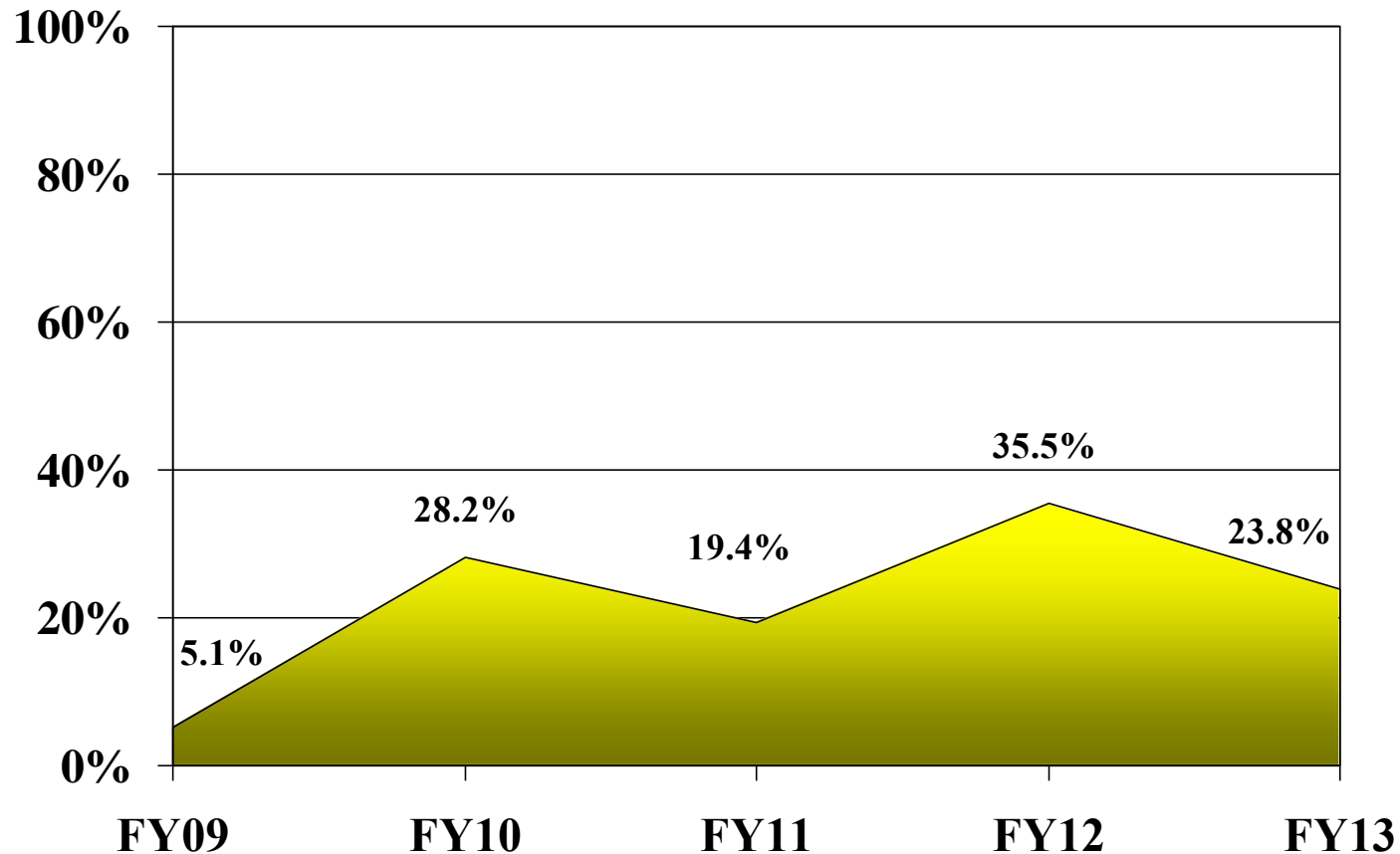
Conditions of Probation - §8D1.3

- No new federal, state or local crimes;
- Impose at least one of the following conditions for felony offenses:
 - Restitution, or
 - Community serviceUnless fine is imposed or court makes finding that condition is plainly unreasonable.
- Other conditions reasonably related to nature and circumstances of offense or history or characteristics of organization and involving only deprivation of liberty and property necessary to effect purposes of sentencing

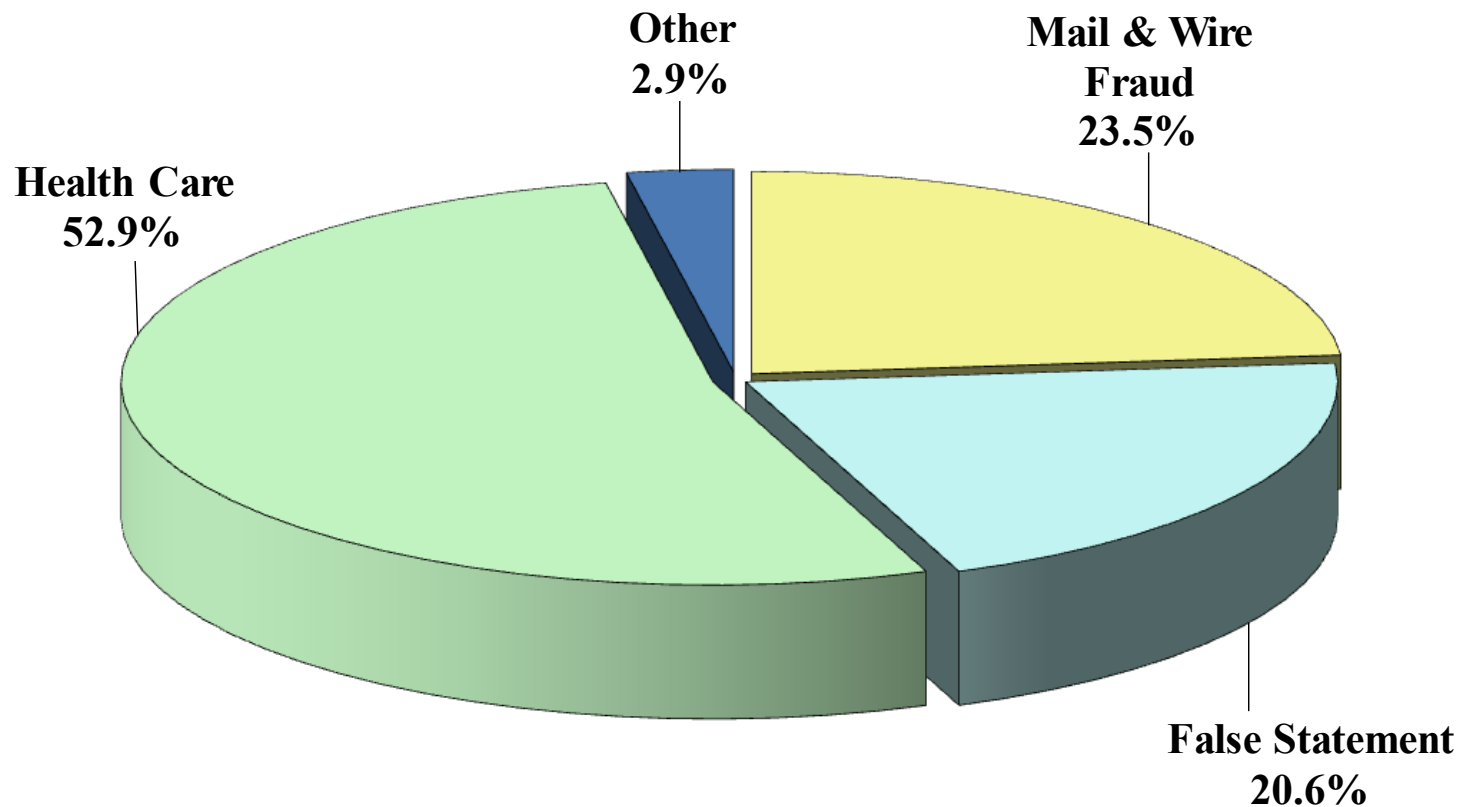
Recommended Conditions of Probation - §8D1.4

- Publicize information about offense, conviction, sentence, and any steps to prevent future misconduct
- If probation is imposed under §8D1.1, the following conditions may be appropriate
 - Develop an Ethics and Compliance (E&C) program;
 - Once E&C program approved, notify employees and shareholders about criminal conduct and E&C program;
 - Make periodic submissions to court about financial condition and report on progress implementing E&C program;
 - Notify of material changes in financial condition or commencement of administrative, civil, or criminal litigation against organization, or any investigations or formal inquiries by governmental authorities;
 - Submit to reasonable inspection of books and records and interrogation of knowledgeable employees and pay any costs associated with experts;
 - Make periodic payments toward monetary sanctions (priority to restitution, fine and then other).

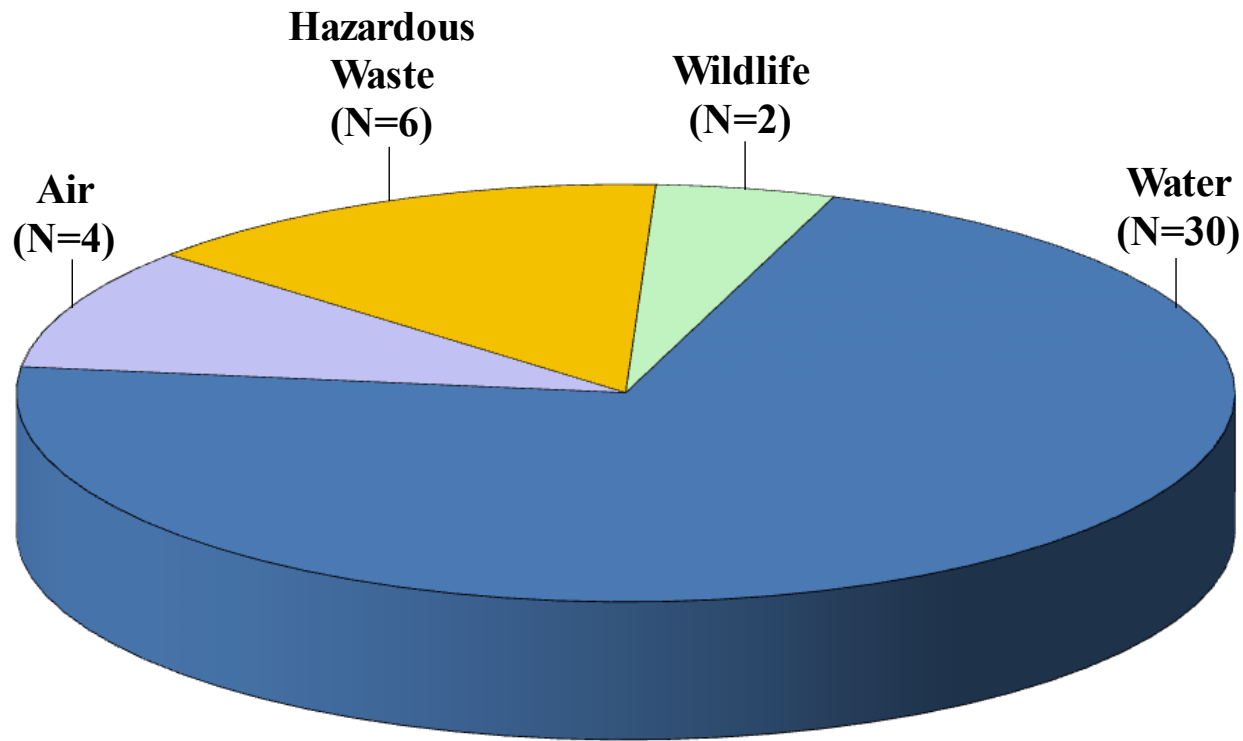
Percentage of Organizational Cases With Court Ordered Compliance / Ethics as Component of Sentence Fiscal Years 2009-2013



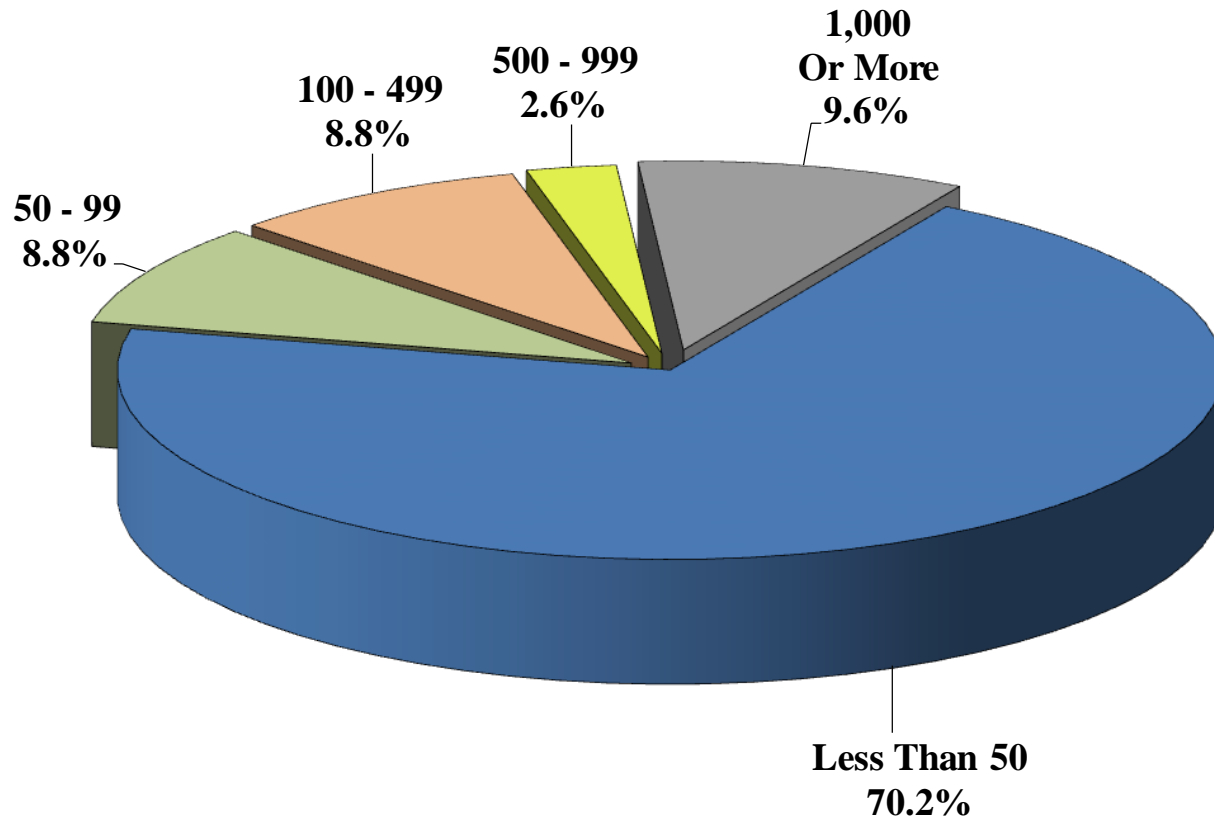
Fraud Offenses in Organizational Cases Fiscal Year 2013



Number of Environmental Organizational Cases Fiscal Year 2013

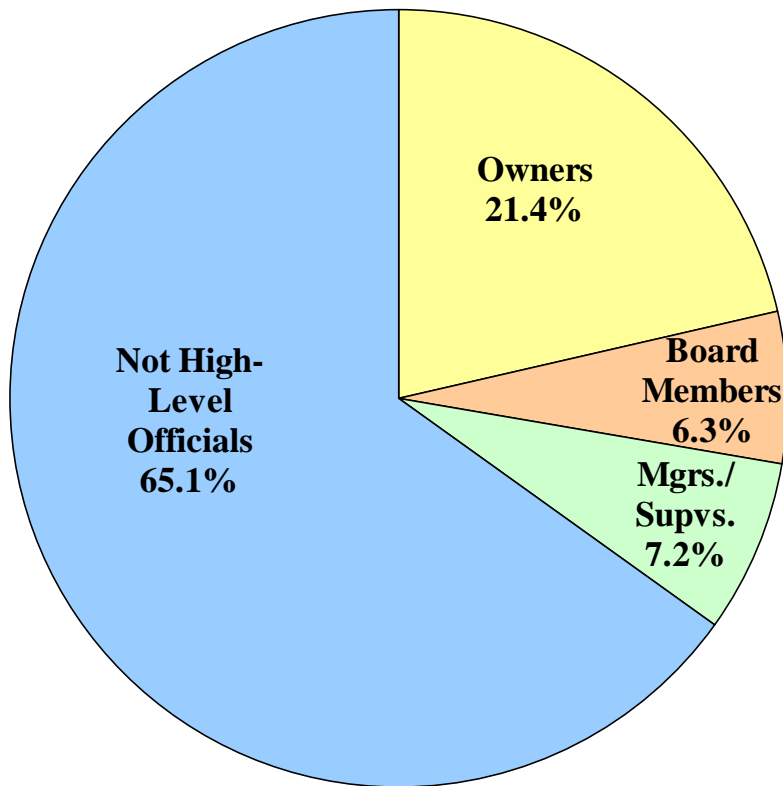


Size of Organizations Sentenced By Number of Employees Fiscal Year 2013

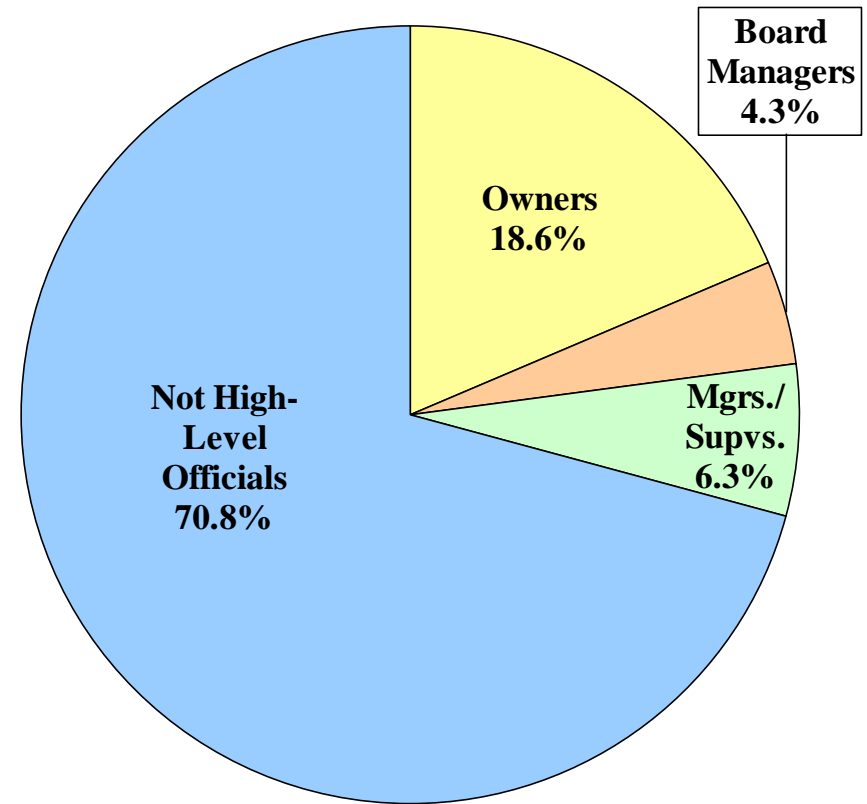


Percentage of Individual Offenders Who Were “High-Level” Officials of Co-Defendant Organizations Fiscal Years 2012-2013

FY12



FY13



U.S.S.C.

Web Site

www.usssc.gov

HelpLine

202-502-4545